FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	**MUR 5874**
Gun Owners of America, Inc.	)	

STATEMENT OF REASONS OF VICE CHAIRMAN DAVID M. MASON

The Brady Campaign to Prevent Gun Violence filed the complaint in this matter alleging that the Gun Owners of America ("GOA") violated the Federal Election Campaign Act (the "Act"), 2 U.S.C. § 431 et seq. The alleged violations involve GOA making "illegal in-kind contributions" to federal candidates by expressly advocating the election or defeat of federal candidates to the general public through "web activities."[1] The Federal Election Commission (the "Commission") accepted recommendations of the Office of General Counsel and voted 4-0 to: (1) find no reason to believe a violation of the Act occurred, (2) close the files, and (3) send appropriate letters.[2] I write separately to clarify the scope of 11 C F.R. § 114.4(c)(5) and to note the questionable constitutional validity of 11 C.F.R. § 100 22(b).

I. BACKGROUND

In October, 2006, GOA's website included a 2006 Voter's Guide which rated every Senate and Congressional candidate in all 50 states based on his position on gun issues. Each candidate was given equal space in the voter guide, and there were no marks of any kind indicating a preference for any one candidate over another. Each candidate was rated on a scale from "A+" to "F" with an additional rating of "MR" for candidates who refused to answer the questionnaire seeking information for the ratings, or had no record on gun issues. No other information about the candidates or comment on their fitness for office was included in the voter guide. While candidates were rated in the guide based on their position on gun issues, the guide did not expressly advocate the election or defeat of specific candidates For example, in some races multiple candidates in the same race were given identical grades, including grades of "A" or "F." No one political party appears to have been favored in the grading of candidates.[3]

On November 2, 2006, GOA sent an e-mail alert to subscribers of its communications. The e-mail alert referenced and provided a link to the voter guide. The e-mail alert included phrases like "with the election less than two weeks away," "why we need to take the upcoming election VERY SERIOUSLY," "the upcoming election may well determine the fate of our gun rights," and "toward

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[1] *See Gun Owners of America, Inc* , Matter Under Review ("MUR") 5874, Compl. at 1 (Nov. 1, 2006).
[2] Voting affirmatively were Commissioners Lenhard, Mason, von Spakovsky and Walther Commissioner Weintraub did not vote
[3] MUR 5874 Factual and Legal Analysis ("FL&A") at 2.

that end, Gun Owners of America has provided a valuable resource to help you on Election Day" (referencing and linking to the voter guide) But the e-mail did not identify or reference any federal candidate or any political party, and there were no words of express advocacy contained in the e-mail.[4]

II. DISCUSSION

A. Voter Guides

The Act prohibits corporations from making expenditures in connection with any election to any political office. 2 U S.C. § 441b(a), 11 C.F.R. § 114.2(a). An independent expenditure is "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate" "that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17), 11 C F.R. § 100 16. Corporations may "prepare and distribute to the general public voter guides consisting of two or more candidates' positions on campaign issues" provided that such guides comply with either 11 C F R. § 114.4(c)(5)(i) or (ii)(A)-(E). 11 C.F.R. § 114.4(c)(5).

Prior to revisions made in 2003, the Commission applied two different content standards to voter guides depending on the degree of contact a corporation or labor organization had with a federal candidate under 11 C.F.R. § 114.4(c)(5)(i) or (ii). Under the first standard, voter guides prepared without any communication with a candidate were not permitted to contain express advocacy. 11 C.F.R. § 114 4(c)(5)(i) (2002) (no contact standard). Under the second standard, voter guides prepared with written questions submitted to candidates could not contain an electioneering message 11 C.F.R. § 114 4(c)(5)(ii) (2002) (written contact exception).

In 2003, the Commission revised 11 C F R. § 114.4(c)(5)(i) and (ii). *See* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 450 (Jan. 3, 2003). As a result of the 2003 revisions, the regulations now embody identical conduct standards triggering two different content tests. Both 11 C.F.R. § 114.4(c)(5)(i) and (ii) currently impose the same contact standard: that there be no cooperation, consultation, or consultation between a corporation or labor organization and a federal candidate. That creates a single content test: voter guides may not contain express advocacy.

As a result of the Commission's revisions, 11 C F.R. § 114.4(c)(5)(ii) is rendered a nullity. 11 C F.R. § 114.4(c)(5) provides that corporations or labor organizations must comply with *either* 11 C.F.R. § 114.4(c)(5)(i) *or* (ii) in creating voter guides. The electioneering message standard is unenforceable for three reasons.

First, the phrase "electioneering message" is not defined in the Act or the regulations, and its meaning is not otherwise clear. The Commission may not enforce restrictions on corporate speech that are vague or uncertain in application. *See Buckley v Valeo*, 424 U.S. 1, 41-42 (1976); *FEC v Wisconsin Right to Life, Inc.* ("*WRTL II*"), 127 S.Ct. 2652, 2680-81 (2007).

Second, for reasons of both vagueness and overbreadth the Commission has rejected use of the electioneering message test in all applications. *See* Statements of Reasons of Commissioners Lee Ann Elliott, David M. Mason, and Karl J. Sandstrom on the Audits of Dole for President Committee, Inc, Clinton/Gore '96 Primary Committee, Inc., Dole/Kemp '96, Inc., Dole/Kemp '96 Compliance

[4] *Id* at 2-3

Committee, Inc , Clinton/Gore '96 General Committee, Inc., and Clinton/Gore '96 General Election Legal and Compliance Fund (June 24, 1999). While continued use in the regulations of a term the Commission has otherwise rejected normally would create interpretive difficulties, in this instance, where there is an alternative standard covering the same universe of conduct the rejected standard should be ignored and the valid standard used exclusively

Third, to the extent that a meaning of electioneering message can be discerned, it is broader than express advocacy. When two standards, one broader and the other more narrow, cover the same conduct the rule of lenity requires that the narrower standard be applied. While this rule has its principal application in criminal cases, Commission regulations are applicable in criminal contexts, *In re Sealed Case*, 665 F.Supp. 56 (D.D.C. 1987), and First Amendment principles similarly require a preference for narrower constructions in laws regulating election-related speech *See Buckley*, 424 U.S. at 75.

Since 11 C.F R. § 114.4(c)(5)(i) and (ii) contain the identical conduct standard, voter guides prepared and distributed by corporations or labor organizations can only be analyzed under 11 C.F.R. § 114.4(c)(5)(i). Accordingly, under subsection (i), express advocacy is the sole test governing voter guides unless they are otherwise coordinated. [5] Because there was no express advocacy in the communications at issue, the voter guides were permissible under 11 C.F.R. § 114.4(c)(5)(i).[6]

B. 11 C.F.R. § 100.22(b)'s Questionable Validity

In this matter, the Commission determined that the voter guides and communications in question were not express advocacy under 11 C.F R. § 100.22(a) and (b). I agree with the Office of General Counsel's determination that the communications were not express advocacy under either test. Going one step further, the United States Supreme Court brought the constitutional validity of 11 C.F.R. § 100 22(b) into grave doubt since with its opinion issued in *WRTL II.*

The conclusion that GOA's voter guide does not fall under the purview of 11 C.F.R. § 100.22(b) does not mean that the Commission believes section 100.22(b) is enforceable in future matters. In short, there is substantial uncertainty that the Commission constitutionally could enforce it against an organization whose communications fell within section 100.22(b)'s regulatory reach. *See* Notice of Proposed Rulemaking, *Electioneering Communications*, 72 Fed. Reg. 50,261 (Aug. 31, 2007).

In *WRTL II*, Chief Justice Roberts explained that speech standards must avoid the "open-ended rough-and-tumble of factors" to survive constitutional scrutiny. *Id.* at 2666 (quoting *Jerome B. Grubart, Inc v Great Lakes Dredge & Dock Co* , 513 U.S. 527, 547 (1995)). Considerations such as timing, the intent of the speaker, the effect of the communication, other speech made by the speaker, and different sources to which the communication refers are excluded contextual reference points. *Id.* at 2668-2670. Section 100.22(b) suffers from the exact type of constitutional frailties described by the Chief Justice because it endorses an inherently vague "rough-and-tumble of factors" approach in demarcating the line between regulated and unregulated speech.

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[5] Consequently, there is never a reason to reach an analysis under 11 C F R § 114 4(c)(5)(ii)
[6] FL&A at 4-5.

As the Court in *Buckley* explained, and *WRTL II* reaffirmed, the line between regulable express advocacy, or its functional equivalent, and issue advocacy must be protective of issue advocacy, easily understood, and give the benefit of the doubt to speech. *See Buckley*, 424 U.S. at 43-44 (construing "expenditures" "relative to a clearly identified candidate" to reach only express advocacy due to vagueness concerns); *WRTL II* at 2666 (requiring clear standards to protect issue advocacy), and 2674 (affording the benefit of doubt to speech, not censorship) 11 C.F.R. § 100.22(b) does not toe those constitutional lines.[7] With its focus on external events and what a reasonable person might interpret speech to mean, Section 100 22(b) rests on unsustainable constitutional premises.

Further, 100 22(b) resembles the *WRTL II*'s plurality test for the "functional equivalent" of express advocacy, such that some commentators believe the two tests are functionally the same [8] Express advocacy and its "functional equivalent" cannot be identical. *See McConnell v FEC*, 540 U S. 93 (2003) and *WRTL II* at 2665-2667 (both refusing to overturn *Buckley* and interpreting the electioneering communication test as broader).

Thus, to the extent that 100.22(b) is broader or more vague than the *WRTL II* test, it is constitutionally impermissible. *WRTL II* at 2669-2670. If the test is identical, its application is impermissible under principles of statutory and judicial construction.

III. CONCLUSION

The Commission's earlier revisions to 11 C.F.R. § 114.4(c)(5)(i) and (ii) provide that there is only one standard to be applied to non-coordinated voter guides: that they not expressly advocate the election or defeat of a clearly identified candidate. In addition, Section 100 22(b) of the Commission's regulations is constitutionally suspect for purposes of future enforcement matters.

November 15, 2007

David M. Mason
Vice Chairman

[7] In 2007, the Commission opened a Notice of Proposed Rulemaking ("NPRM") to revise electioneering communications. *Electioneering Communications*, 72 FED. REG. 50261 (Aug. 31, 2007). In addition, the NPRM asks whether "WRTL II require[s] the Commission to revise or repeal any portion of its definition of express advocacy at section 100.22." *Id* at 50263.

[8] Joint comments filed by Campaign Legal Center, Democracy 21, the Brennan Center for Justice, Common Cause, the League of Women Voters, and U.S. PIRG in the *Electioneering Communications* NPRM at 16 (stating that section 100 22(b) and the "*WRTL II* tests are virtually indistinguishable").